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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No.

UNITED STATES NAVIGATION COMPANY, INC., Petitioner,

against

THE CUNARD STEAMSHIP COMPANY, LTD., OCEANIC STEAM NAVIGATION COMPANY, LTD., FURNESS WITHY & COMPANY, LTD., ATLANTIC TRANSPORT COMPANY, LTD., ANCHOR LINE (HENDERSON BROS.), LTD., BRISTOL CITY LINE OF STEAMERS, LTD., CANADIAN PACIFIC STEAMSHIPS, LTD., DONALDSON BROS., LTD., ELLERMAN'S WILSON LINE, LTD., G. HEYN & SONS, LTD., F. LEYLAND & COMPANY, LTD., MANCHESTER LINERS, LTD., CAIRN LINE OF STEAMSHIPS, LTD., FRANKLIN A. RYAN and JAMES SINCLAIR.

PETITION FOR A WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, United States Navigation Company, Inc., respectfully shows to this Honorable Court as follows:

A. Summary Statement of the Matter Involved

1. *The Proceedings*

This is a petition for a writ of certiorari by the plaintiff in an action in equity and is sought to review a final decision of the Circuit Court of Appeals for the Second Circuit (R. 100 *et seq.*) rendered by a divided court, which affirmed a decision of the United States District Court for the Southern District of New York, dismissing the bill of complaint.

The petitioner brought this action in the United States District Court for the Southern District of New York to enjoin the defendants from participating further in a combination and conspiracy in restraint of trade and attempt to monopolize the foreign trade and commerce of the United States in violation of the Act of Congress, July 2, 1890, entitled "An Act to protect commerce against unlawful restraints and monopolies." *U. S. Code,* Ti. 15, §§ 1-7.*

The petitioner prays for injunctive relief under Section 16 of the Act of Congress of October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes." *U. S. Code,* Ti. 15, § 26.*

The bill of complaint charges violations of the anti-trust laws and seeks relief under those laws exclusively, and neither charges as such any violation of nor seeks any relief under the Shipping Act of 1916. *U. S. Code,* Ti. 46, §§ 801-842.*

A motion by the defendants, in the nature of a demurrer, to dismiss the bill of complaint was granted by

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* The pertinent sections of these statutes are printed as Appendix A in the brief accompanying this petition, *infra,* pp. 36-39.

Hon. Francis G. Caffey, United States District Judge, who filed a memorandum opinion on December 11, 1929 (R. 72-81). The opinion is reported in 39 F. (2d) 204. Pursuant to leave the petitioner then filed an amended bill of complaint which the defendants moved to dismiss on the same grounds, which were principally based upon the contention that the District Court is without jurisdiction to entertain the complaint because the subject matter of the complaint is exclusively within the jurisdiction of the Shipping Board under the Shipping Act of 1916 (R. 65-67).

In his supplementary opinion dated January 16, 1930, Judge Caffey dismissed the amended bill on the ground that it did not raise any questions essentially different from those dealt with in the earlier opinion (R. 70-71). From the decree dismissing the amended bill of complaint the petitioner appealed to the Circuit Court of Appeals for the Second Circuit (R. 85).

While the appeal was pending in the Circuit Court of Appeals but before a hearing or decision by that court the petitioner, on April 19, 1930, filed a petition for a writ of certiorari to review the case in advance of consideration by that court. This court denied the petition on May 19, 1930. 281 U. S. 759.

The appeal was heard by the Circuit Court of Appeals on October 22, 1930, and was decided May 18, 1931 (R. 100), 50 F. (2d) 83.

As the decision below arose on a motion to dismiss in the nature of a demurrer, there are no facts in dispute, and the questions presented by the motion relate solely to the jurisdiction of the District Court to entertain the complaint.

2. *The Facts*

The petitioner is a New York corporation and since May, 1919, has operated an independent line of steamships in the general cargo trade between New York and London and Liverpool (R. 5).

The complaint alleges a combination and conspiracy of the associated lines, including the defendants herein, which together carry 95 per cent. of the general cargo trade from North Atlantic ports in the United States to ports of Great Britain and Ireland (R. 11). The petitioner and the combined lines are the only carriers maintaining regular cargo service in this trade (R. 12). The object of the combination, as alleged in the complaint, is to drive the petitioner out of this trade and monopolize the same (R. 13-14).

The principal means alleged to be used by the combination is a system of joint exclusive patronage contracts by which the combination requires shippers to agree to ship exclusively by the lines of the combination and to refrain from making any shipment in this trade by a vessel of the petitioner. This agreement not to ship by the vessels of the petitioner is demanded as the consideration for a schedule of rates lower than those charged shippers who will not agree so to restrict all of their shipments. The line of the petitioner in this trade runs only from New York to London and Liverpool. If a shipper gives any part of his shipments to these ports to the petitioner, he is unable to ship to Glasgow, for example, by any of the respondent lines except at the higher rates, although such line runs its ships only to Glasgow (R. 15-19).

The power and combined economic resources of all the combined lines acting in concert and combination

pursuant to these agreements and understandings have deprived shippers in this trade of freedom of selection of the particular carrier whose facilities best fit their requirements (R. 13).

Other practices complained of are manipulation of the general tariff and contract rates to coerce shippers into making exclusive contracts (R. 19), persuading shippers to disregard instructions of their buyers to ship by the petitioner's line (R. 20), inducing cancellation of contracts between shippers and the petitioner (R. 20-21), granting rebates (R. 21), circulating false statements as to the petitioner (R. 21-22), coercive use of patronage (R. 22), application of coercion to shippers in other trades (R. 23), and threats to blacklist forwarders (R. 23).

The amended complaint sets forth in Part IV thereof (R. 23-44), a number of specific overt acts in furtherance of the combination, conspiracy, and attempt.

The agreements and understandings constituting the combination and conspiracy in restraint of trade and the attempt to monopolize trade and commerce, alleged in the amended bill to have been entered into since the enactment of the Shipping Act, have not been filed for approval with, or approved by the United States Shipping Board (R. 44), as required by Section 15 of the Shipping Act of 1916, *U. S. Code*, Ti. 46, § 814; so that these agreements do not fall within the only exemption from the anti-trust laws provided for in the Shipping Act.

The gist of the action is the combination and conspiracy to restrain trade and commerce and the attempt to monopolize the same by procuring these exclusive patronage contracts. The allegations as to the rates

themselves are merely descriptive of the means used to coerce the shippers into making the contracts. The reasonableness of either the contract rate or general tariff rate is not in issue. The rates may in fact be unreasonable and discriminatory but this is neither the basis nor a necessary element of the cause of action.

3. *Opinion of the Circuit Court of Appeals*

The decision of the Circuit Court of Appeals was rendered by a divided court, Judge Swan dissenting. The majority opinion, rendered by Judge A. N. Hand, with whom Judge L. Hand concurred, held:

1. The agreement set forth in the amended bill of complaint involves a violation of the Sherman Anti-Trust Act, at least in the absence of approval by the United States Shipping Board, pursuant to Section 15 of the Shipping Act.

2. Notwithstanding such violation of the Sherman Act a private party is not afforded a remedy under Section 16 of the Clayton Act because that section excepts matters subject to the jurisdiction of the Interstate Commerce Commission and a similar exception should be implied in respect of matters subject to the jurisdiction of the Shipping Board.

3. The implication of such an exception arises because (a) "the Supreme Court has been increasingly disposed to treat the remedies afforded by that [Interstate Commerce] Act as exclusive" in spite of the provision therein saving other remedies existing at common law or by statute, and (b) the Shipping Act does not contain such a clause saving other remedies.

4. In the case of land carriers the decisions of the Supreme Court now require prior resort to the Interstate Commerce Commission wherever complicated questions of fact arise and experience in technical matters is required, including practically all questions of reasonableness.

5. If the agreement complained of in the bill had related to land carriers it would have had to be passed on by the Interstate Commerce Commission before resort to the courts because (a) "the gravamen of the cause of action in the case at bar was the unreasonableness of the agreed rates of carriage" and (b) restraints of trade, unless unreasonable, are not contrary to the Sherman Act.

6. The Shipping Act not only does not save other remedies but also provides ample remedies of its own and sets up a standard based on the welfare of the industry rather than on restraint of competition, which standard can be applied only by a special fact-finding tribunal having an intimate acquaintance with the needs and practices of the business and constant experience in resolving the merits of conflicting interests in a vast and complicated industry.

7. Notwithstanding the provisions of Section 15 of the Shipping Act that agreements made after the organization of the Shipping Board

> "shall be lawful only when and as long as approved by the Board and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement * * *"

and notwithstanding the allegations of the amended bill, admitted by demurrer, that the agreements and understandings between the defendants pursuant to which the acts complained of have been carried out have not been filed with or approved by the Board, nevertheless a private suitor may not invoke the jurisdiction of the District Court because the Shipping Act provides complete remedies for all the alleged wrongs, and in the absence of investigation by the Shipping Board it is impossible to say whether there is a "substantial grievance."

8. "If the allegations in the amended bill are found to be correct, the anti-trust acts have been violated, but the Shipping Act has been violated as well." Further, "It is difficult to suppose that Congress ever intended to give private parties two sets of remedies, under each of which reparation as well as other relief might be had, and still harder to imagine that these remedies might be pursued *pari passu*." Therefore "a choice must be made between the two possible remedies of a suit under the Anti-Trust Acts and a proceeding before the Shipping Board."

9. Notwithstanding the jurisdiction conferred upon the courts by the Sherman and Clayton Acts, "every reason of policy and convenience should prompt the courts to 'take arms against a sea of troubles' by requiring resort to the Shipping Board in situations like the present" because of the nature of the questions involved and the broad powers given to the Shipping Board under the Shipping Act.

In his dissenting opinion Judge Swan considered:

1. As the acts complained of are forbidden by the Sherman Anti-Trust Act, the petitioner should have an injunction unless this remedy has been taken away from it because similar relief may be obtained from the Shipping Board.

2. The Shipping Act of 1916 does not expressly repeal existing rights and remedies, and as repeals by implication are not favored, the remedies to which the petitioner would otherwise be entitled should not be denied. The remedy of injunctive relief should not be refused to it merely because similar relief of injunctive character might be obtained from the Shipping Board.

3. "The similar injunctive relief which I have assumed the plaintiff might obtain from the Board (though the language of the Shipping Act does not seem to be so clear as to put the matter entirely beyond question) should be considered an additional remedy, not a remedy in substitution for that which the plaintiff might seek in the courts."

4. "An injunction forbidding the carriers from acting under the agreement unless and until they shall file it and obtain the Board's approval of it, would in no way hamper the Board's administrative functions—indeed, under the allegations of the complaint (admitted by the demurrer), the Board could not legally approve the agreement."

B. Questions Presented.

Both courts below having held that the defendants' agreements violated the anti-trust laws (R. 74, 100 *et seq.*), the questions raised by the decision of the Circuit Court of Appeals affirming the decree which granted the defendants' motion to dismiss the amended complaint are as follows:

1. Where the only reference to the anti-trust laws contained in the Shipping Act is a provision excepting properly filed and approved agreements from their operation, did the enactment of the Shipping Act constitute a repeal by implication of the anti-trust acts as to agreements which had not been filed and approved?

2. Although the general provisions of Section 16 of the Clayton Act permit injunctive relief to private parties for violation of the anti-trust laws, is an ocean carrier deprived of such remedy by analogy to the exception in that section precluding such relief against rail carriers in matters subject to the regulation of the Interstate Commerce Commission, although neither that Act nor the Shipping Act contains any similar exception affecting ocean carriers?

3. Does the circumstance that the acts alleged in the amended complaint were or may have been violations of the Shipping Act of 1916, as well as of the anti-trust laws, constitute a sufficient reason for denying relief under the anti-trust laws?

4. Does the circumstance that the Shipping Board has or may have jurisdiction to afford a remedy under

the Shipping Act require the denial of jurisdiction of the District Court to grant a remedy under the anti-trust laws?

5. By analogy to the reasoning of the decision in *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 1907, 204 U. S. 426, and of other decisions on questions arising under the Interstate Commerce Act, must the relief prayed for in the amended bill of complaint be sought exclusively from the Shipping Board,

(a) Where the agreements and understandings complained of have not been made lawful by approval of the Shipping Board so as to be exempted under Section 15 of the Shipping Act from the operation of the anti-trust laws (R. 44),

(b) Where the United States Shipping Board has already held unlawful similar use of exclusive patronage contracts (R. 45),

(c) Where the agreements and understandings complained of are of such terms and character that they could not lawfully be approved by the Shipping Board (R. 45),

(d) Where the practices complained of do not present or involve the determination of any administrative questions, and

(e) Where the agreements and understandings and many of the practices complained of are expressly made unlawful *per se* by the specific terms of the Shipping Act itself (R. 79).

C. Reasons for Granting this Application

It is respectfully submitted that this Court should review this case on certiorari, for the following reasons:

1. The questions raised, particularly the legality of the combination to force exclusive patronage contracts on shippers, are of importance not only to the parties to this litigation and to shippers and others interested in trade between North Atlantic ports of the United States and ports in Great Britain and Ireland, but to all carriers, merchants and shippers in all other trades and to the foreign trade and commerce of the United States as a whole. The courts below have held that the agreements and understandings alleged in the amended bill of complaint violate the Sherman Anti-Trust Act, and are not made lawful under the provisions of the Shipping Act. It is of manifest importance to all interested in the foreign trade and commerce of the United States, shippers as well as carriers, that this court authoritatively determine the question whether a private party is entitled to a remedy in the courts of the United States against such unlawful acts.

2. The case presents an important question of construction of a federal statute, viz. whether the enactment of the Shipping Act of 1916, which granted to the Shipping Board certain supervisory and regulatory powers and exempted certain agreements among carriers from the condemnation of the anti-trust laws only when filed with and approved by the Shipping Board, should be considered as effecting the repeal of the Sherman and Clayton Acts so as to deprive a private party of relief in the federal courts in respect of monopolistic practices

committed pursuant to agreements which have not been filed with or approved by the Board. In other words, where Congress has, by the enactment of the Clayton Act, distinctly conferred jurisdiction upon the federal courts to enjoin practices which violate the Sherman Act, do the proper principles of statutory construction require the court to imply a repeal of that law and refuse to entertain jurisdiction because Congress has, in the enactment of the Shipping Act of 1916, set up a regulatory body which may also have jurisdiction to grant similar relief? The decision of the Circuit Court of Appeals, that by enacting the Shipping Act of 1916 Congress intended to give private parties only one set of remedies and therefore impliedly repealed the Clayton Act in its application to combinations and restraint of foreign trade in ocean commerce, is unsound and in conflict with the principles of its own decision in *Meeker* v. *Lehigh Valley R. R. Co.*, 1910, 183 Fed. 548, and with the decisions of this Court in *Great Northern Ry.* v. *Merchants Elevator Co.*, 1922, 259 U. S. 285; *Penna. R. R. Co.* v. *Puritan Coal Co.*, 1915, 237 U. S. 121; *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.*, 1912, 223 U. S. 70; and other cases.

3. The jurisdiction of the courts of the United States to grant relief to a private party under the Clayton Act against unlawful monopolies and combinations in restraint of trade in foreign commerce, and the effect, if any, of the provisions of the Shipping Act of 1916 upon such jurisdiction, have not been passed upon by this Court. The decisions of this Court relied upon by the Circuit Court of Appeals, involve the jurisdiction of the courts to entertain complaints in respect of land carriers

subject to the jurisdiction of the Interstate Commerce Commission; and the conclusion of the Circuit Court of Appeals is derived by supposed analogy to those decisions. How far the analogy is controlling in respect of ocean commerce, and if controlling whether it leads to the result below, in view of the different language contained in the Shipping Act of 1916 and the statutes relating to land carriers, is a question of public importance which remains open, is directly involved in this action, and should be authoritatively determined by this Court. The dissenting opinion of Judge Swan in the Circuit Court of Appeals indicates grave doubt as to the correctness of the majority opinion on the questions (1) whether the possibility of similar injunctive relief at the hands of the Shipping Board under the provisions of the Shipping Act of 1916 constitutes a sufficient ground for denying the petitioner a remedy under the Clayton and Sherman Acts; and (2) whether the analogy to the decisions of this Court in respect of land carriers, upon which the majority opinion chiefly relied, requires a denial of the court's jurisdiction to afford the petitioner the remedies provided by the Clayton Act.

4. In an action very similar to this case pending in the United States District Court for the Eastern District of Louisiana, New Orleans Division, *New Orleans Corrugated Box Company, Inc.* v. *Luckenbach Steamship Co., Inc., et als.*, No. 19,745, the court reached a conclusion opposite to the decision of the District Court and Circuit Court of Appeals in this case. In that case the bill of complaint charges a combination and conspiracy by the defendants jointly to solicit from the shippers contracts, by which the shippers agree to ship exclusively

by one of the defendant common carriers, all cargo for carriage from Gulf ports to Pacific Coast ports. The means of coercion used by the defendants for the attainment of such monopoly are essentially similar to those pleaded in the present case. The bill of complaint in that case, as in the present case, is based on a violation of the anti-trust laws. A motion to dismiss the complaint on the ground of lack of jurisdiction of the District Court to entertain the subject matter of the action, similar to the motion in the present case, was denied by Judge Borah without opinion on November 7, 1930. Consequently, as the decisions now stand and until the question is authoritatively determined by this Court, the District Court for the Eastern District of Louisiana, New Orleans Division, has a broader jurisdiction than the District Courts in the Second Circuit.

5. It is believed that the denial of the previous application for a writ of certiorari, prior to the hearing and decision of the appeal in the Circuit Court of Appeals, does not import an expression of opinion by this Court as to the merits of the case. *United States* v. *Carver*, 1923, 260 U. S. 482, 490. The opinion of the Circuit Court of Appeals rendered since the denial of the previous application brings to a clearer focus the fundamental question whether the enactment of the Shipping Act of 1916 constitutes a sufficient ground for a judicial repeal of the Clayton Act in its application to private parties who are injured by violations of the anti-trust laws at the hands of a combination of ocean carriers who have not sought or seen fit to apply to the Shipping Board for approval of their acts. Moreover, the dissenting opinion of Judge Swan and the grounds of his difference of opin-

ion upon the fundamental issues involved indicate the importance of the questions presented by this case and the necessity for their authoritative determination by this court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket October 1930 Term, No. 5, United States Navigation Company, Inc., Appellant, v. The Cunard Steamship Company, Ltd., et al., Appellees, to the end that such cause may be reviewed and determined by this Court, as provided by law; that the said decree of the Circuit Court of Appeals for the Second Circuit be reversed by this Honorable Court; with directions to the District Court to deny the motion to dismiss the amended bill of complaint herein; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

UNITED STATES NAVIGATION COMPANY, INC.,

by MARK W. MACLAY,

JOHN TILNEY CARPENTER,

Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No.

UNITED STATES NAVIGATION COMPANY, INC., Petitioner,

against

THE CUNARD STEAMSHIP COMPANY, LTD., OCEANIC STEAM NAVIGATION COMPANY, LTD., FURNESS WITHY & COMPANY, LTD., ATLANTIC TRANSPORT COMPANY, LTD., ANCHOR LINE (HENDERSON BROS.), LTD., BRISTOL CITY LINE OF STEAMERS, LTD., CANADIAN PACIFIC STEAMSHIPS, LTD., DONALDSON BROS., LTD., ELIERMAN'S WILSON LINE, LTD., G. HEYN & SONS, LTD., F. LEYLAND & COMPANY, LTD., MANCHESTER LINERS, LTD., CAIRN LINE OF STEAMSHIPS, LTD., FRANKLIN A. RYAN and JAMES SINCLAIR.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I

THE OPINIONS OF THE COURTS BELOW

The opinion of the Circuit Court of Appeals (R. 100-110) is reported in 50 F. (2d) 83.

The opinion of the District Court (R. 70-81) is reported in 39 F. (2d) 204.

II

Jurisdiction

1. The statutory provision believed to sustain the jurisdiction of this court is Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, *U. S. Code,* Ti. 28, 347(a).

2. The order for mandate of the Circuit Court of Appeals, review of which is sought, was entered on May 25, 1931 (R. 119), pursuant to the decision of that court rendered May 18, 1931 (R. 100).

III

Statement of the Case

A full statement of the case has been given under heading A of the petition and is therefore not repeated at this point.

IV

Specification of Errors

The decision of the Circuit Court of Appeals affirming the decree of the District Court dismissing the amended bill of complaint is erroneous in finding and holding that:

1. Although the agreements and understandings among the defendants involve a violation of the Sherman

Anti-Trust Act and have not been made lawful by approval by the Shipping Board under the provisions of the Shipping Act of 1916, nevertheless the District Court is without jurisdiction to grant injunctive relief to a private party injured by such agreements and acts committed pursuant thereto, notwithstanding that such jurisdiction is expressly conferred by Section 16 of the Clayton Act, *U. S. Code,* Ti. 15, § 26.

2. The exception contained in Section 16 of the Clayton Act, whereby no person except the United States may bring suit in the courts for injunctive relief against rail carriers in matters subject to the jurisdiction of the Interstate Commerce Commission, is extended so as to deny jurisdiction of the courts to grant injunctive relief against common carriers by water in foreign commerce.

3. The District Court was without jurisdiction to grant injunctive relief under the Clayton Act, based on violations of either or both Sections 1 and 2 of the Sherman Act, on the ground that the Shipping Act of 1916 granted to the Shipping Board power to afford remedies for all the wrongs recited in the amended bill of complaint.

4. If the agreements and understandings complained of had related to land carriers, they would have had to have been passed on by the Interstate Commerce Commission before resort to the courts.

5. "The gravamen of the cause of action in the case at bar was the unreasonableness of the agreed rates."

6. By enacting the Shipping Act of 1916, Congress set up a standard for the shipping business, which standard can be applied only by a special tribunal; and the courts are incompetent to determine whether such agreements and understandings violate that standard.

7. The Shipping Act of 1916 ousted the courts of jurisdiction to entertain the amended bill of complaint alleging violations of and asking relief under only the anti-trust laws, until the remedies afforded under the Shipping Act should have been exhausted.

8. By analogy to the reasoning of the decision in *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 1907, 204 U. S. 426, and other decisions on questions arising under the Interstate Commerce Act, the petitioner is confined for its remedy to resort to the United States Shipping Board and the court was without jurisdiction to entertain the amended bill of complaint, although

(a) The agreements and understandings complained of had not been approved by the Shipping Board so as to be lawful under Section 15 of the Shipping Act and thus excepted from the provisions of the anti-trust laws,

(b) It appeared from the amended complaint that the United States Shipping Board had already declared unlawful similar use of the joint exclusive contract,

(c) The agreements and understandings alleged are of such a character that they could not lawfully be approved by the United States Shipping Board,

(d) The agreements and understandings alleged were of such a character that any construction of the Shipping Act of 1916 which would render them lawful would *ipso facto* render that statute unconstitutional for indefiniteness,

(e) No administrative question is presented for decision, and

(f) The use of unapproved agreements and understandings and other practices complained of are expressly made unlawful *per se* by the specific terms of the Shipping Act itself.

V

Argument

A. The circumstance that the facts alleged in the amended complaint were or may have been violations of the Shipping Act is not a sufficient reason for depriving the petitioner of its legal or equitable remedies under the anti-trust acts or for confining the petitioner to proceedings before the Shipping Board under the Shipping Act.

The decision of the Circuit Court of Appeals is based upon the theory that because resort might be had to the Shipping Board under the Shipping Act for relief against violations of that Act, therefore resort *must* be had to the Shipping Board to the exclusion of the jurisdiction conferred upon the courts by the anti-trust acts.

The petitioner contends that the mere right to seek relief before an administrative tribunal does not neces-

sarily oust the courts of their jurisdiction to grant relief under the anti-trust acts. It is submitted that the dissenting opinion of Judge Swan in the Circuit Court of Appeals was correct and that, under the principle that repeals by implication are not favored, such remedy as the Shipping Board may have power to afford your petitioner in proceedings under the Shipping Act of 1916 should be considered an additional remedy, not a remedy in substitution for that which the plaintiff is entitled to receive in the courts under the Sherman and Clayton Acts.

The court below relied on the analogy of the Interstate Commerce Act to land carriers and deduced from that analogy that the court has no jurisdiction over the subject matter of the complaint. But notwithstanding the jurisdiction of the Interstate Commerce Commission, which comprehends much broader regulatory powers than those of the Shipping Board, the federal courts have held that state and federal common law and statutory provisions apply to and will be enforced by the courts against illegal restraints of trade by land carriers. *Penna. R. R. Co.* v. *Sonman Coal Co.*, 1916, 242 U. S. 120, 124; *Penna R. R. Co.* v. *International Coal Co.*, 1913, 230 U. S. 184, 196; *U. S.* v. *Freight Association*, 1897, 166 U. S. 290; *U. S.* v. *Joint Traffic Association*, 1898, 171 U. S. 505; *U. S.* v. *Union Pacific R. R. Co.*, 1912, 226 U. S. 61; *Meeker* v. *Lehigh Valley R. Co.*, C. C. A. (2nd) 1910, 183 Fed. 548.

In *U. S.* v. *Pacific & Arctic Co.*, 1913, 228 U. S. 87, this Court sustained jurisdiction to afford relief under the Sherman Act although the same facts might entitle the plaintiff to ask the Interstate Commerce Commission for relief under the Interstate Commerce Act.

There is nothing in the Shipping Act susceptible of the construction that the Board has general jurisdiction over monopolies and restraints of trade, nor is there any language in the Shipping Act expressly or impliedly giving the Shipping Board jurisdiction over combinations of ocean carriers to the exclusion of the courts. The powers of the Shipping Board are confined to administrative regulation and supervision under the provisions of the Shipping Act itself, as is clear from the language of Sections 14(a), 16, 17, 21-24, 26-28; *U. S. Code*, Ti. 46, §§ 813, 815, 816, 820-823, 825-827.

The decision of the court below, to the effect that the enactment of the Shipping Act and the grant of certain powers to the Shipping Board thereunder implies an intention on the part of Congress to repeal the anti-trust acts in respect of ocean carriers in foreign commerce, is not only without support of any language to be found in the Shipping Act, but is contrary to the clear intention of that Act.

The only express reference to the Anti-Trust laws in the Shipping Act appears in Section 15, as follows:

> "Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1 to 11, inclusive, and section 15 of chapter 1, of Title 15, Commerce and Trade, and amendments and Acts supplementary thereto." *U. S. Code*, Ti. 46, § 814.

The only agreements "lawful under this section" which are so excepted from the operation of the anti-trust acts are those which were either (1) in existence at the time of the passage of the Shipping Act on September 7, 1916, and not subsequently disapproved by

the Board, or (2) thereafter filed with and approved by the Board. All other agreements are expressly declared to be unlawful by the following provisions of Section 15 of the Shipping Act:

> "All agreements, modifications or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification or cancellation." *U. S. Code*, Ti. 46, § 814.

Instead of the language of the Shipping Act indicating an intention to oust the courts of jurisdiction of combinations and conspiracies which have not been approved by the Board, the language of the Act clearly shows that Congress intended to remove from the jurisdiction of the courts only certain classes of agreements, and then only when, and if, they have been filed with and approved by the Board.

It seems a necessary corollary that it was the congressional intent to preserve the full power and effect of the anti-trust laws as to all agreements, modifications or cancellations, made after the organization of the Board, which either have not been approved by the Board or have been disapproved by it.

As the agreements here involved have not been filed with and approved by the Board (R. 44-45), it follows that the jurisdiction of the court remains unimpaired.

The Circuit Court of Appeals considered that in the absence of investigation by the Shipping Board it is impossible to say whether "there is a substantial griev-

ance," because it considered that some agreements which would offend the anti-trust acts might be validated by the sanction of the Shipping Board under the Shipping Act.

The court apparently considered that confusion would result if the courts should pronounce a given line of conduct illegal under the anti-trust acts, with the possibility that the Shipping Board might pronounce the same line of conduct valid under the Shipping Act and therefore exempt it from the condemnation of the anti-trust laws. Apparently regarding as too burdensome the "sea of troubles" which might confront the court in determining the questions raised by an anti-trust suit involving ocean carriers in foreign commerce, the court below held the jurisdiction of the Shipping Board exclusive, on the theory that the Board is peculiarly equipped to decide such questions from the point of view of the benefit of the shipping industry as a whole.

The court apparently failed to apprehend that, by the plain language of Section 15 of the Shipping Act of 1916, the exemptions from the anti-trust acts which are afforded by the Shipping Act come into being only by affirmative approval by the Shipping Board. Acts committed by the defendants which violate the anti-trust laws may be judicially condemned and remedies given by the court under those acts, consistently with the jurisdiction of the Shipping Board to condemn or approve similar acts under the powers conferred upon it. If the defendants wish to obtain whatever benefit may be thought to be derived from an investigation and determination by the Shipping Board of the acts complained of in the amended complaint, or the application of a possibly different standard of conduct by the Ship-

ping Board from that required by the courts, it is for the defendants to file their agreements with the Board and obtain its approval as required by the precise terms of the Shipping Act. Until that is done the anti-trust laws, including the Clayton Act, should be considered completely operative.

B. THE EXCEPTION IN SECTION 16 OF THE CLAYTON ACT, WHEREBY PRIVATE PARTIES ARE NOT PERMITTED INJUNCTIVE RELIEF AGAINST LAND CARRIERS IN RESPECT OF MATTERS SUBJECT TO THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION, SHOULD NOT BE EXTENDED BY IMPLICATION TO OCEAN CARRIAGE.

Injunctive relief for violation of the anti-trust laws is given to private parties in general terms by Section 16 of the Clayton Act. In this section, however, it is provided that a private party is not entitled to such injunctive relief "against any common carrier subject to the provisions of" the Interstate Commerce Act "in respect of any matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission." *U. S. Code*, Ti. 15, § 26.

The Circuit Court of Appeals held that this case falls within the exception rather than within the general terms of Section 16. This extension of the exception beyond its express terms is implied from what the court describes as the increasing tendency of this Court to treat the remedies afforded by the Interstate Commerce Act as exclusive.

The theory of the court below that Congress could not have intended to give private parties a remedy both

in the courts and at the hands of a regulatory body, and that therefore the courts are ousted of their jurisdiction, is not supported by the decisions of this Court under the Interstate Commerce Act. *Texas & Pacific Ry.* v. *Gulf Ry.*, 1926, 270 U. S. 266; *Great Northern Ry.* v. *Merchants Elev. Co.*, 1922, 259 U. S. 285; *Penna. R. R. Co.* v. *Sonman Coal Co.*, 1916, 242 U. S. 120, 124; *Penna. R. R. Co.* v. *Puritan Coal Co.*, 1915, 237 U. S. 121; *Penna. R. R. Co.* v. *International Coal Co.*, 1913, 230 U. S. 184; *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.*, 1912, 223 U. S. 70, are illustrative cases holding that the right of a private person to redress at the hands of an administrative tribunal is not necessarily a bar to similar relief from the courts.

Moreover, there is no language in the Shipping Act which implies legislative intent to repeal the Clayton Act in its application to agreements and understandings and acts committed pursuant thereto by common carriers by water in foreign commerce when they have not been made lawful by the Shipping Board's approval under that Act.

It seems that if the result reached by the Circuit Court of Appeals had been intended by Congress it would have amended Section 16 of the Clayton Act so as to add to the exception matters subject to the regulation, supervision or other jurisdiction of the Shipping Board, or would have included in the Shipping Act a provision to the same effect.

In view of the significant absence of any express statutory justification, the broad extension by implication of the exception in Section 16 of the Clayton Act so as to deny relief to this petitioner is not warranted by the grounds advanced by the Circuit Court of Appeals.

C. UNDER THE REASONING OF THE DECISIONS OF THIS COURT ON QUESTIONS ARISING UNDER THE INTERSTATE COMMERCE ACT, THE PETITIONER SHOULD NOT HAVE BEEN DEPRIVED OF ITS REMEDY UNDER THE ANTI-TRUST LAWS.

The court below held that the acts complained of in the amended bill of complaint present a question which, had land carriers been concerned, would have required primary resort to the Interstate Commerce Commission. On what was regarded, by analogy, as the authority of *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 1907, 204 U. S. 426, and decisions of this Court concerning the functions and powers of the Interstate Commerce Commission, the court below held that the Shipping Board has exclusive primary jurisdiction and that the petitioner's only remedy on the facts alleged is resort to the Shipping Board.

The court below apparently considered that there was presented a question of administrative discretion because

> "the gravamen of the cause of action in the case at bar was the unreasonableness of the agreed rates of carriage which, had land carriers been concerned, would have been a matter requiring primary resort to the Interstate Commerce Commission" (R. 100 *et seq.*).

The petitioner contends that this conclusion, and the premise upon which it is based, are unsound and result from a misconception of the fundamental issues of the case.

It is clear that no question of rates is involved, or any other matter involving administrative discretion, and that a judicial adjudication can be made of the

wrongs recited in the amended bill without any necessity for passing upon the reasonableness or unreasonableness of the rates charged by the combined lines of the defendants.

As far as the petitioner is concerned there is no objection to the combined lines fixing any rate they choose for their contract and for their general traffic business. The petitioner is solely concerned with and bases this portion of its complaint only upon the combined use by the defendants of the exclusive patronage contract, and their joint refusal to carry at a certain rate except in consideration of exclusive patronage, for the purpose of obtaining monopoly of the trade. The objectionable feature is the agreement not to ship by the petitioner's vessels being made the consideration for any inducement offered by the combination. The gravamen of the complaint is not affected by the reasonableness or unreasonableness of any rate.

The contentions of the petitioner concerning the analogy of the decision in *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 1907, 204 U. S. 426, which it is urged should be passed upon by this court, are as follows:

1

This court in the *Abilene* case and subsequent cases dealing with the same subject matter has held that the courts are ousted from their jurisdiction at common law or, as here, expressly conferred by statute, only in a limited class of cases by implication arising from the requirement of uniformity in matters involving the exercise of administrative discretion, or necessarily requiring the opinion of a body of experts.

Where, however, no such question is presented, the courts retain their jurisdiction without preliminary resort to the regulatory body. Ordinarily, the determining factor is the character of the controverted question and the nature of the inquiries necessary for its solution. Only controversies involving issues essentially of fact or calling for the exercise of administrative discretion require prior resort to the Commission. The line of demarcation was pointed out in *Great Northern Ry.* v. *Merchants Elev. Co.*, 1922, 259 U. S. 285, 291, 295-6 & note.

However, not every case which involves questions of fact requires preliminary resort to the regulatory commission. *Texas & Pacific Ry.* v. *Gulf Ry.*, 1926, 270 U. S. 266.

2

The doctrine of the *Abilene* case has no application where, as here, the determination of the illegality of the defendants' conduct is not dependent upon some matter committed to the Commission for its administrative determination. *Great Northern Ry. Co.* v. *Merch. Elev. Co.*, 1922, 259 U. S. 285, 296 & note. *Penna. R. R. Co.* v. *Sonman Coal Co.*, 1916, 242 U. S. 120; *Penna. R. R. Co.* v. *Puritan Coal Co.*, 1915, 237 U. S. 121; *U. S.* v. *Pacific & Arctic Co.*, 1913, 228 U. S. 87; *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.*, 1912, 223 U. S. 70.

3

This case presents no question of an administrative character or otherwise requiring the exercise of admin-

istrative discretion or the application of specialized knowledge such as is commonly thought to be found only in a body of technical experts. The court is competent to pass upon the charges made in the bill, without any necessity of preliminary resort to the Shipping Board, for the following reasons:

(a) The chief question here is not one of the validity or reasonableness of rates, but of the illegality under the Sherman Act of a combination's attempt to monopolize the trade by exacting exclusive patronage as the consideration for preferential treatment of shippers. The charge of unreasonableness of the differential between contract and non-contract rates is not the gravamen of the complaint, as thought by the court below, but is merely descriptive of the means employed by the combined lines in attempting to eliminate the petitioner's competition. The gravamen of the complaint is the use of a differential in any amount whatever, conditioned upon the agreement of shippers to patronize the defendants' services and thereby to refrain from patronizing the petitioner's vessels. *Amended Bill,* 44-52. "The plan makes the parts unlawful." *U. S.* v. *Pacific & Arctic Co.,* 1913, 228 U. S. 87, 105.

(b) Similar attempts to obtain a monopoly by the device of exclusive patronage contracts have been condemned without it being considered necessary to pass upon the question of the reasonableness of the rates charged. This has been held not only at common law, *Menacho* v. *Ward,* 1886, 27 Fed. 529, but also under the Sherman Act, *U. S.* v. *Pacific & Arctic Co.;* 1913, 228 U. S. 87; *U. S.* v. *Great Lakes Towing Co.,* 1913, 208 Fed. 733, 217 Fed. 656; and by the Shipping Board

itself under the provisions of the Shipping Act, *Eden Mining Co.* v. *Bluefields Fruit & Steamship Co.*, 1922, 1 U. S. S. B. 41 (set forth in full as Appendix A in the Amended Bill of Complaint, R. 50-63).

4

Even if it be considered that there exists any question of administrative discretion with respect to the defendants' attempt to obtain a monopoly by the device of exclusive contracts, such discretion has been exercised already by the Shipping Board. *Eden Mining Co.* v. *Bluefields Fruit & Steamship Co., supra.* Consequently the doctrine of the *Abilene* case cannot be invoked to oust the jurisdiction of the courts. *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 1913, 230 U. S. 247, 257; *National Pole Co.* v. *Chicago & N. W. Ry. Co.*, C. C. A., 7th, 1914, 211 Fed. 65, 71-73; *Freeman* v. *U. S.*, C. C. A., 8th, 1925, 4 F. (2nd) 13. The difficulty thought by the court below to exist, as to whether the *Eden Mining Co.* decision created a precedent binding upon the Shipping Board, is in reality non-existent when the clear principle which the Shipping Board applied in that case is kept in mind.

5

There is no room for the exercise of administrative discretion here, inasmuch as the Board could not properly approve and render lawful the agreements complained of, and any construction of the Shipping Act which permitted the Board to legalize these agreements would, *ipso facto*, render the Act unconstitutional.

The discretion of an administrative tribunal is a discretion which must be exercised within the limitations

and obligations imposed by the law of its being. While it is true that the language of Section 15 as to the powers of the Board to approve or disapprove agreements filed with it by carriers is broad, nevertheless it must exercise its approval in accordance with legal standards. The terms "unjustly discriminatory or unfair" are set up as standards for the action of the Shipping Board, and are terms with well-established meanings in that branch of the common law which deals with discriminatory and unfair competition as well as under the anti-trust acts and statutory regulation of public enterprise.

If the Shipping Act could be interpreted as permitting the Board to approve and make lawful acts which were *per se* "unjustly discriminatory or unfair" by the well-settled principles of law, as are the acts here complained of, then, under such a construction, the act wholly fails to set up a standard for the guidance of the administrative board sufficiently certain to bring the delegation of legislative power within constitutional limits. *U. S.* v. *Cohen Grocery Co.*, 1921, 255 U. S. 81.

The dissenting opinion of Judge Swan in the court below correctly held that:

> "In the case at bar, however, the agreement complained of has not been, and can not legally be, approved by the Shipping Board" (R. 100 *et seq.*).

6

Finally, and what seems to the petitioner to be conclusive of the whole point, these understandings and agreements among the combined lines of the defendants are expressly declared by the administrative act to be

unlawful, for it affirmatively appears that they have been entered into since the passage of the Shipping Act and have not been filed with or approved by the Board (R. 44-45). Where the specific act alleged is clearly in violation of the administrative act, so that no question of administrative discretion is involved, the fact that resort might be had to an administrative body does not oust the courts of their jurisdiction to grant relief even under the regulatory act itself; and *a fortiori* they may grant relief under another statute. *Penna. R. R. Co.* v. *International Coal Co.*, 1913, 230 U. S. 184; *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 1913, 230 U. S. 247; *American R. Co.* v. *South Porto Rico Sugar Co.*, C. C. A., 1st, 1923, 293 Fed. 670, 674-675.

The court below fell into the error of considering that the *Abilene* case requires a determination by the administrative commission of the illegality of the agreements and practices complained of. It is noteworthy, however, that in the *Abilene* case the rates had been established, filed with the commission and published as required by the regulatory statute, and thus were held valid unless and until set aside by the commission; whereas in the present case the agreements and understandings, pursuant to which the acts complained of have been committed, have *not* been filed with or approved by the Shipping Board. As they are thus illegal *per se*, under the express terms of the Shipping Act, the petitioner should be entitled to enforce its remedies in the District Court without a preliminary decision to that effect by the regulatory commission. The fact that the agreements and understandings complained of are unlawful by the terms of the Shipping Act itself is a sufficient reason, not for refusing but for retaining, jurisdiction.

Conclusion

Your petitioner respectfully submits that a final determination by this Court should be had of the questions of law involved herein as to the jurisdiction of the District Court to entertain the complaint and the petitioner's right to injunctive relief under the anti-trust acts against the practices of which it complains. For these questions are of great importance not only to the litigants in this case, but to all shippers and carriers in the maritime commerce of the United States and go directly to the jurisdiction of the federal courts under the anti-trust acts.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that a final determination may be had, and that to such end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Second Circuit, order that its decision be reversed and direct that the motion to dismiss the amended bill of complaint be denied.

New York, August 12, 1931.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX A

SHERMAN ANTI-TRUST ACT, SECS. 1 & 2

(Act of July 2, 1890, c. 647, §§ 1 & 2, 26 Stat. 209; U. S. Code, 1926, Ti. 15, §§ 1 & 2)

Section 1. Trusts, etc., in restraint of trade illegal; penalty. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *

Section 2. Monopolizing trade a misdemeanor; penalty. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *

CLAYTON ACT, SEC. 16

(Act of Oct. 15, 1914, c. 323, § 16, 38 Stat. 737; U. S. Code, 1926, Ti. 15, § 26)

Injunctive relief for private parties; exception. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is

granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

SHIPPING ACT, 1916, SEC. 15

(Act of Sept. 7, 1916, c. 451, § 15, 39 Stat. 733; U. S. Code, 1926, Ti. 46, § 814)

Agreements Between Carriers, etc.—Approved by Board—Penalties.

That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or appor-

tioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hun-

dred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.